

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 22/2019

In the matter between:

THE STATE

and

SAGARIUS LEVI

ACCUSED

Neutral citation: *S v Levi* (CC 22/2019) [2020] NAHCMD 257 (29 June 2020)

Coram: SIBEYA, A.J

Heard: 18 June 2020

Delivered: 29 June 2020

Flynote: Criminal Procedure – Sentence – Murder with direct intent Accused killed the deceased who attempted to restore peace between the accused and his ex-girlfriend – Society calls for severe sentence – Remorse although belatedly expressed coupled with the court's observation found to be genuine – Time spent in custody pending trial mitigates the sentence – Principles applicable to sentencing revisited– Lengthy custodial sentence inevitable – Accused sentenced to 23 years' imprisonment.

Summary: The accused was indicted in the High Court on the charge of murder and that of housebreaking with intent to murder and assault by threat. He pleaded not guilty to both counts, offered no plea explanation and opted to remain silent. On 11 June 2020, this court after hearing evidence, convicted the accused on the charge of murder with direct intent. The accused was found not guilty and acquitted on the charge of housebreaking with intent to murder and assault by threat.

Held that, in sentencing, courts should consider the crime, the offender and the interest of society as well as the element of mercy together with the purposes of sentencing.

Held further that, substantive time spent in custody awaiting trial should be considered in sentencing. The effect thereof on the sentence will vary from case to case.

Held further that, the nature and seriousness of the offence of murder calls for lengthy period of imprisonment in sentencing and courts should play its part in the process.

Held further that, it is aggravating that the deceased intended to restore peace when he lost his life.

Held further that, remorse although expressed at the late stage of the trial, considered together with the observation of the court, found to be genuine.

ORDER

Murder – 23 (twenty-three) years' imprisonment.

SENTENCE

SIBEYA AJ:

[1] It is well settled in our courts that sentence should fit the crime, the offender and the interests of society (often referred to as the triad factors).¹

[2] This court convicted the accused on a charge of murder with *dolus directus* on 11 June 2020. He was found not guilty and acquitted on the second count of housebreaking with intent to murder and assault by threat. The conviction emanated from a fully-fledged trial, after the accused pleaded not guilty to both charges and evidence was heard.

[3] This court is now obliged to pass an appropriate sentence individualised to this matter.

[4] *Mr. Ipinge* appeared for the state while *Mr. Kamwi* appeared for the accused.

[5] Added to the triad factors, is an element of mercy worthy of consideration during sentencing, as stated in *S v Khumalo*.² Mercy should, however, not constitute pity as a convicted person should be punished out of consequence. The purposes of punishment, being deterrent, preventative, reformatory and retributive require proper consideration and this court considers same.³ In attempt to balance the factors of sentencing, it may sometimes be unavoidable to emphasise one factor at the expense of the others.⁴

[6] The accused did not testify in mitigation of sentence but his personal circumstances were placed on record by *Mr. Kamwi*. The accused is aged 27 years old, unmarried and has a 4 years old daughter whom he supported with a monthly payment of N\$400. His daughter stays with her mother. He is an orphan. Before his arrest on 12 November 2018, the accused who dropped out of school in grade 7, worked as a builder and earned N\$2,000 to N\$3,000 per month. He is a first

¹ *S v Zinn* 1969 (2) SA 537 (A).

² 1973 (3) SA 697 (A) 698.

³ *S v Tcoeib* 1991 NR 263.

⁴ *S v Van Wyk* 1993 NR 426 (SC).

offender. He dropped out of school in grade 7. He has been in police custody since his arrest and has therefore spent 1 year and 7 months in custody awaiting trial.

[7] *Mr Kamwi* submitted that the period spent in custody pending trial should receive sufficient consideration. It is now trite law that a period spent in custody awaiting trial is a material factor to be considered in mitigation.⁵ The effect of such factor on sentencing will vary from case to case when considered with all other mitigating and aggravating circumstances. *In casu*, I take into account the substantial amount of time spent in custody of 1 year and 7 months as a weighty mitigating factor in conjunction with all other relevant factors to sentencing. *Mr. Kamwi* further submitted that mercy should be extended to the accused who is relatively young and may still return to society and live a meaningful life.

[8] The crime of murder is a very serious offence and what aggravates this offence in this matter is the fact that the accused stabbed the deceased with an okapi knife once on the neck with direct intention to kill him. This is further aggravated by the fact that the deceased, a good neighbour, sadly lost his life while attempting to restore peace between the accused and his ex-girlfriend (*Ms. Garises*). The deceased advised the accused who was quarrelling with *Ms. Garises* at night to desist from doing so, leave the place of *Ms. Garises* and return the next morning to resolve their differences. The deceased further suggested to *Ms. Garises* that she could go to his (the deceased's) house the next morning and reside there for about a week, as the deceased was due to leave town on a work-related assignment. The accused then stabbed the deceased. The deceased was 28 years old at the time of his death.

[9] *Mr. Ipinge* submitted that the fact that, after stabbing the deceased, the accused walked passing by persons who were loading the deceased in motor vehicle to rush him to the hospital without offering assistance aggravates this matter. This court harbours no doubt regarding the correctness of this submission and is in agreement with *Mr. Ipinge*. The seriousness of the offence is beyond measure and this court in *S v Katanga*⁶ in para 12 quoted with approval the following passage from *S v Matolo and another 1998 (1) SACR 206 (O) at 211d-f*:

'In cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an

⁵ *S v Kauzuu* 2006 (1) NR 225 (HC).

⁶ (CC23/2018) [2019] NAHCMD 66 (27 February 2020).

unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct.'

[10] *Mr. Ipinge* submitted further that the accused showed no signs of remorse. The accused in mitigation apologised to the court for his actions. The apology was belatedly done. This court in *Hango v S* at para 13 -15 stated the following on remorse expressed at the twilight of a trial:⁷

'[13] Notwithstanding, the trial court proceeded to find that the appellant did not show remorse. The court reasoned that genuine remorse is expressed at the beginning of the trial and remorse expressed after a full trial when witnesses are excused cannot be genuine. This court however in *S v Shaningua*⁸ to the contrary stated the following at para 10:

"The accused in this matter pleaded not guilty and required of the State to prove the allegations set out in the indictment. This the State did, and secured convictions on both counts. I do not believe that in all instances where an accused expresses remorse only after conviction, can it be said that it is not sincere. Much will depend on the circumstances of the case and I have no doubt that there could be circumstances in which the court would be able to find that remorse, albeit demonstrated only after conviction, is genuine and sincere."

[14] In light of the above, the finding of the trial court can therefore not be correct.

[15] Where a convicted person testifies under oath and expresses remorse but same is left unchallenged, unless there are clear reasons to the contrary, such remorse can be said to be genuine. *In casu*, the appellant emphatically stated that he committed the offences, repeatedly apologised and said that he was wrong. He further said that he will not recommit the offences. This court therefore finds that the trial court misdirected itself when it decided that the appellant was not remorseful.'

[11] The apology expressed by the accused was not strictly speaking gainsaid. The court also had the opportunity to observe the accused and he appeared to

⁷ (HC-MD-CRI-APP-CAL-2019/00090) [2020] NAHCMD 201 (29 May 2020).

⁸ (CC 09/2016) [2017] NAHCMD 247 (31 August 2017).

regret his actions. This court accepts that although expressed at such late stage of the trial, coupled with the court's observation, the accused showed remorse. Remorse is a significant factor in mitigation as it demonstrates that the accused will not recommit similar offences.

[12] The offence of murder was not premeditated and was committed on the spur of the moment. It is apparent from the evidence that the quarrel was between the accused and the deceased while the deceased simply intended to have peace prevail. It counts in the accused's favour that the offence was not pre-planned but it is aggravating that the deceased killed a peace maker.

[13] When regard is had to the interests of society, it is emphasised that society expects that convicted persons should be sentenced according to the circumstances of a particular case. Severe punishment for crimes of murder should be the order of the day in order to deter convicted persons and would be offenders from committing similar offences.

[14] Retribution and deterrence require that the court should in sentencing take into account the pain and suffering caused by the commission of the offence to the injured party and the affected members of the community, over and above the public in general. It is only after serving the sentence and having been reformed that society can welcome the accused back in the community.

[15] Taking into account the personal circumstances of the accused inclusive of his aforesaid mitigating factors, time spent in custody, his remorsefulness and weighing same with the nature, seriousness of offence of murder committed with direct intent and the interests of society, I find that a lengthy period of imprisonment should be imposed. The parties are also *ad idem* that a length term of imprisonment is inevitable in the circumstances. The parties further referred the court to different matters where this court sentenced persons convicted of murder with direct intent to sentences ranging from 18 to 30 years' imprisonment.

[16] This court finds that, the sentence to be imposed should be reduced by the weighty mitigating factors and further that mercy should be extended to the accused. The accused should further not be sentenced to a punishment that will break him, neither should he be sacrificed at the altar.⁹

⁹ *S v Katema* (CC09/2017) NAHCMD 125 (16 November 2018) para 12.

[17] Considering all the above-mentioned factors, reasoning and conclusions, this court is of the view that the sentence set out hereunder meets the justice of this case. In the result the accused is sentenced as follows:

Murder – 23 (twenty-three) years' imprisonment.

O S SIBEYA
ACTING JUDGE

APPEARANCES:**STATE:**

H Ipinge
Of Office of the Prosecutor-General
Windhoek

ACCUSED:

K Kamwi
Of K Kamwi law Chambers
(Instructed by Legal Aid)
Windhoek